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BEFORE THE UTAH AIR QUALITY BOARD

In Re: Approval Order – PSD Major Modification to Add New Unit 3 at Intermountain Power Generating Station, Millard County, Utah Project Code: N0327-010 DAQE-AN0327010-04	:	**SIERRA CLUB'S MEMORANDUM IN SUPPORT OF ITS PROPOSED SCHEDULES**
and	:	
In Re: Approval Order – the Sevier Power Company 270 MW Coal-Fired Power Plant, Sevier County Project Code: N2529-001 DAQE-AN2529001-04	:	

The Utah Chapter of the Sierra Club and Grand Canyon Trust (collectively "Sierra Club") respectfully submit this Memorandum in Support of their Proposed Schedules. These schedules, attached to this memorandum, provide a timeline to guide the proceedings on Sierra Club's requests for agency action to the Air Quality Board (Board) challenging approval orders issued by the Executive Secretary of the Division of Air Quality (DAQ) for the Intermountain Power Plant Unit 3 (Unit 3) and Sevier Power Corporation (SPC) generating units and challenging DAQ's subsequent modification of the DAQ permit. Below, Sierra Club explains the basis for its scheduling request.

Background

On December 12, 2006, the Utah Supreme Court issued an order sending Sierra Club's requests for agency action back to the Board. After more than a two year suspension resulting from challenges by the applicants, Intermountain Power Service Corporation (IPSC) and Sevier Power Corporation (SPC), (collectively, "Applicants"), to Sierra Club's standing, these proceedings before the Board are starting over essentially from step one. The Board has not yet issued notices of the requests for agency action under Utah Admin. Code R307-103-5(1). DAQ has not yet provided the responses to the requests for agency action required under Utah Admin. Code R307-103-5(2). Similarly, the Applicants have not responded to the requests for agency action. Nor has DAQ compiled the administrative records regarding the permitting decisions, nor delivered them to the Sierra Club and the other parties.

In addition, in August, 2006, DAQ approved a modification to the Unit 3 approval order, substituting a subcritical boiler, the technology analyzed though out the permitting process, with a supercritical boiler. DAQ took this action without public notice and comment, without lowering the emissions limits in the permit, and without requiring IPSC to submit a revised notice of intent for its new proposal, despite the terms of the approval order.[1]

To proceed with the Unit 3 and SPC matters, this Board must first establish a schedule that allows adequate time for discovery, motions, and other crucial steps that are part of formal adjudications such as this one. Sierra Club has filed proposed schedules that set forth timeframes for these processes, and, in this memorandum underscores why justice and fairness favor the adoption of those schedules.

Fairness and Efficiency Requires Adequate Time to Uncover All Relevant Facts, to Resolve Issues That Can be Addressed Without a Trial, and to Present Remaining Claims to the Board Fully and Systematically.

As the Utah Supreme Court has stated, the Board's decisions on the Unit 3 and SPC permits are of critical importance to the citizens of Utah. The decisions will help guide future permitting decisions for coal-fired generating facilities, as well as other sources of air pollution in our state. The carbon emissions, threats to public health, and

[1] At the suggestion of Board attorney Fred Nelson, and as required by Utah Rules of Civil Procedure 26(f) and Utah Admin. Code R307-103-7(4) and (7)(a), the parties scheduled a conference on December 13, 2006 to discuss a schedule for these proceedings. The parties followed up on this meeting with a conference call on December 18, 2006. The parties were able to agree on the general pattern that the proceedings should follow, including the essential first step of DAQ producing the administrative record and of allowing time in the schedule for submitting motions to the Board. However, the parties disagreed on the timing of the various steps in the process. Because the conferences did not produce agreement on a joint proposed schedule, the parties are submitting individual proposals to the Board for its consideration.

adverse impacts to economic, recreational and aesthetic values from degraded air quality are all increasingly of public concern. The Board, accordingly, cannot allow the process of deciding these appeals to be anything less than thorough and fair. The Board's chief concern in these proceedings, in the words of the Utah Supreme Court, must be "preventing any needless and unlawful pollution or other environmental destruction."[2] To this end, Sierra Club has standing in these appeals to "investigate and review all relevant legal and factual questions relating to the plant[s]."[3]

In light of these concerns, the discovery and hearing schedule Sierra Club proposes is highly reasonable and sets forth the minimum procedural safeguards that are in keeping with the Utah Rules of Civil Procedure, the Utah Administrative Procedures Act (Utah APA) and relevant case law. At the same time, the schedule is intended to streamline the presentation of factual evidence to the Board, when it comes time for the formal hearings on the merits, and to minimize the impacts of these proceedings on DAQ personnel.

The detailed proposed schedule is attached. Significant points in the schedule, explained further below, include:

- A schedule consistent with the provisions of the Utah Rules of Civil Procedure and Utah's due process requirements.
- Sequential, rather than concurrent, proceedings on the Unit 3 and SPC permits that allows SPC to intervene and participate in the Unit 3 proceedings on issues of law that may have a precedential effect in the subsequent SPC proceeding.
- Provisions that allow, after DAQ produces the administrative record to the parties, for motions on issues of law that may not require factual discovery.
- A hearing on these pre-discovery motions in **April 2007.**
- After the Board's decision on the pre-discovery motions, discovery on factual issues and mixed issues of law and fact in the Unit 3 appeal as provided in the Utah Rules of Civil Procedure.
- The close of discovery on **October 31, 2007.** Discovery will likely include document requests and production by the parties, other fact discovery including depositions of agency personnel, and time for expert discovery following fact discovery, as provided in the Utah Rules of Civil Procedure.
- Post-discovery dispositive motions and expanded pre-hearing briefing to narrow the issues for the formal hearing on the merits and present much of the relevant evidence to the Board in documentary form, shortening the time needed for the formal hearing.
- A formal hearing on the merits of the Unit 3 appeal in **February 2008**.
- After the Board's decision in the Unit 3 appeal, an accelerated schedule for discovery and hearing on any factual and legal issues remaining in the SPC appeal, with a formal hearing on the merits as early as **August 2008**.

[2] Utah Chapter of the Sierra Club v. Utah Air Quality Bd., 2006 UT 74, ¶ 42 (2006).
[3] Id.

Due Process Requirements Under Utah Law

The Utah Supreme Court has made clear – parties participating in a Board adjudication are entitled to due process.[4] Safeguards must be in place to "preserv[e] fundamental requirements of procedural fairness in administrative hearings."[5] This is because, in reviewing the decisions of DAQ to issue and modify the Unit 3 and SPC permits, the Board acts in a "quasi-judicial capacity."[6] The Board sits in the place of a trial court, evaluating DAQ's administrative record and allowing the parties to collect evidence, depose witnesses, prepare submissions to the Board, and conduct a hearing to develop a complete "agency record" for review by the Utah Court of Appeals or Supreme Court.

In the context of administrative hearings, the Utah Supreme Court has determined that due process involves a balancing of three factors: 1) the private interest that will be affected by the action, 2) the risk of erroneous harm to that interest through the procedures used, and 3) the government's interest, including fiscal and administrative burdens, that additional procedural requirements would entail.[7] Stricter due process requirements apply to adversarial, adjudicative agency decisionmaking, such as this one. Here, the "most fundamental requirement is 'the opportunity to be heard at a meaningful time and in a meaningful manner.'"[8]

Under the Utah APA, the Board's own rules, and the Utah Rules of Civil Procedure, applicable to these proceedings, a "meaningful time and a meaningful manner" means allowing discovery to ensure that the parties have a full and fair opportunity to develop the facts that will support their claims and defenses. No additional administrative burden will be placed on the Board by allowing the time for discovery established in the Utah Rules of Civil Procedure. At the same time, the potential for avoiding deprivation of Sierra Club's rights will be reduced by allowing a thorough and fair process. These safeguards are so important that, in discussing due process, the Utah Supreme Court has noted that fairness in administrative proceedings "endeavors to prevent **even the possibility** of unfairness."[9]

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[4] Due process is a concept of fairness and justice, guaranteed by the United States and Utah Constitutions, which grants to parties the right to be heard, the right to an orderly process, the right to assert their claims, and the right to access all available information to prove or disprove these claims.

[5] State v. Utah Merit System Council, 614 P.2d 1259, 1262 (Utah 1980).

[6] Id.

[7] V-1 Oil Co. v. Dep't of Envtl. Quality, Div. of Solid & Haz. Waste, 939 P.2d 1192, 1196 (Utah 1997).

[8] Id. at 1197 (quoting Matthews v. Eldridge, 424 U.S. 319, 333 (1976)).

[9] Anderson v. Ind'l Com'n of Utah, 696 P.2d 1219, 1221 (Utah 1985) (emphasis added).

Examination of the case law, such as the Utah Court of Appeal's review of the Sierra Club challenge to the Tooele chemical waste incinerator is instructive here.[10] In that case, Sierra Club argued that being allowed only 12 hours to present its case – involving essentially **two** claims – denied it due process. The court noted that the time allowed for hearing was "somewhat parsimonious," but held that the hearing met the minimum requirements for due process because the Sierra Club received "numerous opportunities to present their positions in forms other than through time-consuming testimony, i.e., pre- and post-hearing briefs, affidavits, deposition transcripts, transcripts from a companion case in federal court, and witness diaries."[11] The shortened hearing complied with due process **only because** ample time had been given in the context of that proceeding for sufficient discovery to be conducted. In the present case, because due process "requires such procedural protections as the particular situation demands,"[12] the larger number of parties, claims, and issues necessary for the Board's resolution dictate a correspondingly longer period than the eight months Sierra Club was given to prepare for the hearings on the Tooele incinerator.

Relatively few reported cases have involved judicial review of administrative board decisions. However, these reported cases indicate that administrative boards have allowed up to 17 months between an agency citing an industry for a violation and the time that violation actually comes before the board for a formal hearing.

- In the Air Quality Board's review of Notice of Violation (NOV) issued to MagCorp, nearly 17 months were spent narrowing the issues and preparing for a formal hearing on the merits of a single alleged violation.[13]
- The Solid and Hazardous Waste Control Board allowed nearly 14 months after a court ordered a hearing on a proposed enforcement action revoking an oil company's certificate of compliance before holding that hearing.[14]
- Similarly, when an industry association challenged the Board of Oil, Gas and Mining rulemaking definitions of "sand," "gravel," and "rock aggregate," more than 12 months of public meetings and comment and fact collection by the board took place from that board's proposal of a

[10] Sierra Club v. Utah Solid & Hazardous Waste Control Bd., 964 P.2d 335 (Utah App. 1998).
[11] Id. at 347.
[12] Worrall v. Ogden City Fire Dep't, 616 P.2d 598, 602 (Utah 1980).
[13] Magnesium Corp. of Am. v. Air Quality Bd., 941 P.2d 653, 656-67 (Utah App. 1997) (Notice of Violation issued September 29, 1994; formal hearing on the merits held February 14, 1996).
[14] V-1 Oil Co. v. Dep't of Envtl. Quality, Div. of Solid & Haz. Waste, 904 P.2d 214, 215-16 (Utah App. 1995) (remand to agency on September 24, 1992; formal administrative hearing held November 10 and 19, 1993).

draft rule to the formal, on-the-record hearing on its proposed definitions.[15]

- In the Safe Drinking Water Board's review of a single NOV against a water company, nearly 6 months passed before a board hearing on the single issue.[16]

As the Supreme Court of Utah has confirmed, the Board's decision on the Unit 3 and SPC permits is of significant importance to the people of Utah. This case, at a minimum, equally implicates the health, welfare, and future of Utahns and the quality of the air they breathe, as cases that have involved up to 17 months for hearing preparation had for the affected industries. The Board has an obligation, as a matter of fairness, precedent and due process, to allow adequate time for the full airing of the claims that underlie these issues. Indeed, as established below the rules which by law apply to the Unit 3 and SPC matters – the Utah Rules of Civil Procedure – define a reasonable and just timeline for discovery and hearing preparation.

Applicable Law and Regulation Set a Default Discovery Period of 330 Days.

The Utah APA and Section R307-103 of the Utah Administrative Code describe the relevant procedures to be followed in preparing for and conducting the Unit 3 and SPC proceedings. Central to such a proceeding and crucial to due process is discovery – or the mechanism by which the parties get information from each other and from witnesses and otherwise prepare for trial. It is discovery that makes a trial run smoothly, allows for many issues to be resolved prior to trial, and insures all relevant facts are before the Board when the hearing gets underway.

Under the Utah APA, an agency may enact rules to "prescribe means of discovery adequate to support [the parties'] claims or defenses."[17] If the agency does **not** enact discovery rules, then "the parties may conduct discovery according to the Utah Rules of Civil Procedure."[18] Utah Admin. Code R307-103 is silent about how discovery is to proceed, and therefore the Utah Rules apply.

Rule 26(d) of the Utah Rules of Civil Procedure provides a default fact discovery[19] period of 240 days, or eight months.[20] Once fact discovery is closed, expert

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[15] Associated Gen'l Contractors v. Bd. of Oil, Gas & Mining, 2001 UT 112, ¶¶ 4-8 (2001) (draft rule proposed February 7, 1997; formal on-the-record hearing held February 25, 1998).

[16] Dep't of Envtl. Quality, Div. Of Drinking Water v. Golden Gardens Water Co., 2001 UT App 173, ¶¶ 2-3.

[17] Utah Code Ann. § 63-46b-7(1).

[18] Id.

[19] Fact discovery involves the exchange of documents, requests for admissions (usually regarding disputed facts) from other parties, subpoenas for documents from non-parties, such as federal agencies, and depositions (or interviews of witness).

discovery begins: Rule 26(a)(3)(C) of the Utah Rules of Civil Procedure states that reports disclosing expert testimony to be presented at trial "shall be made within 30 days after the expiration of fact discovery." Depositions of expert witnesses must be conducted within 60 days after the report is provided.[21] So, the Utah Rules set as a default, a total 330 days for all of discovery. [22]

The purpose of thorough discovery, such as that contemplated by the Utah Rules of Civil Procedure, is to make sure that hearing before the Board meets the requirements of the Utah APA to ensure "to obtain full disclosure of relevant facts and to afford all the parties reasonable opportunity to present their positions"[23] Allowing adequate time for discovery and preparation for the formal hearing on the record will also promote efficiency by allowing the parties to shorten the time required to present evidence at the hearing. Moreover, at the end of the Board's proceedings, all of the materials that it has assembled – DAQ's administrative record, the parties' pleadings and briefs, exhibits and deposition transcripts or excerpts, the hearing transcript and evidence presented at the hearing, and the Board's findings of fact and conclusions of law – become the "agency's record" for purposes of judicial review.[24]

The Administrative Record Must be Designated Before the Parties Take Any Subsequent Steps.

Before these proceeding can start – before any meaningful briefing or discovery can take place – DAQ must produce the administrative record. This record will consist of the documents and other evidence the agency relied on in making the permit decisions. Unless and until this record is designated, the parties will not be able to pin down and reference the exact basis for the permit decisions. Unless and until this record is designated, this record will not be properly before the Board, and the Board will **not** be

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[20] Actually, Rule 26(d) states that the discovery period does not start until an answer or response is filed. In this case, DAQ has not yet filed an answer in either the Unit 3 or SPC matter.

[21] Rule 26(b)(4)(A) of the Utah Rules of Civil Procedure.

[22] Rule 26(d) of the Utah Rules of Civil Procedure also states that discovery may be conducted in any sequence, unless the Board orders otherwise "for the convenience of the parties and witnesses and in the interests of justice." Sierra Club's proposed schedule provides for a structured pattern for discovery to reduce the burden on the parties with limited resources and to set a logical sequence for fact discovery: production of the administrative record, document discovery among the parties, interrogatories and requests for admission, and finally depositions of fact witnesses (including DAQ personnel and potentially personnel from federal agencies which commented on the permits).

[23] Utah Code Ann. § 63-46b-8(1)(a).

[24] Utah Code Ann. § 63-46b-16(3)-(4). Because it there may be judicial review of the Board's decisions in these appeals, it is critical that the record be as fully-developed as possible to ensure proper review in the Utah Court of Appeals or Supreme Court.

able to evaluate the permitting decisions based on information DAQ used to make those decisions.

It is true that Sierra Club, the Applicants, and potential intervenors have some of the relevant documents, and some idea of the basis for DAQ's decisions. However, there is no way to know exactly what DAQ has determined to be the basis for its permitting decisions until the administrative record is formally designated. In addition, there has been no public disclosure of the basis for the August 2006 decision to modify the Unit 3 permit, or the information that DAQ had before it when it made that decision. Until the parties have a certified copy of the administrative record of the DAQ's decisions, submitting or opposing motions on any of the claims in this case will be meaningless guesswork. The Board's review of this case must begin with the formal administrative record on which DAQ relied.

Allowing for Motions That May Avoid the Need for Trial on Various Issues

As established above, the starting point for proceedings to review DAQ's decisions is an indexed, numbered copy of the administrative record. Once that is produced to the parties, the parties appear to be in general agreement that a round of motions that may potentially determine certain issues without further discover is appropriate. Such motions require a time for briefing, a motions hearing before the Board, and the Board's decision.

However, as a general rule in civil trial court litigation, discovery is suspended while dispositive motions are briefed and decided. This is to save parties from spending resources on discovery on issues that the tribunal may be able to decide without relying on discovered facts. Unless the case is of special urgency, such as threats of imminent and irreparable harm, there is no justification for conducting potentially unnecessary discovery while the parties are briefing and arguing motions that do not require discovery. In these two appeals, neither of the permits has been stayed for the past two years, and yet neither Applicant has proceeded with construction. Indeed, IPSC recently asked DAQ to approve a significant modification to its permit, indicating that it is still far from even being able to build. There is no urgency in this case for proceedings to be conducted otherwise than according to the normal discovery process provided in the Utah Rules of Civil Procedure.[25]

What is Likely to be Required During the Discovery Period

As described above, production of the administrative record is the starting point for discovery in these appeals. Additional discovery among the parties will likely be

[25] The parties have also generally agreed that there should be time provided after the close of discovery for post-discovery dispositive motions. However, Sierra Club believes the Board could exclude those motions from the schedule. This would effectively shorten the proposed schedule by about two months, allowing for the formal hearing on the merits of the Unit 3 claims in early January 2008.

necessary, but the parties must be allowed time to review the administrative record before they are required to begin discovery. After the proposed early dispositive motions are decided, and discovery begins, Sierra Club's efforts will focus on gathering documents in preparation to depose the DAQ personnel and other potential fact witnesses, including personnel of the National Park Service and United States Environmental Protection Agency (EPA) who commented on the draft permit.

Most of the issues in these appeals are mixed questions of law and fact. For example, one of the central issues in both appeals is whether DAQ was required to, and properly did, consider integrated gasification combined cycle (IGCC) technology as part of its BACT (best available control technology) analysis. Whether IGCC technology is BACT is a quintessential mixed question of law and fact. The factual determinations that underlie this issue are likely to proceed by comparing IGCC with other technologies, by examining the factual bases of other states and the federal government's determinations regarding IGCC and BACT, and potentially by obtaining discovery from the Applicants about their internal analyses of cost and technical feasibility of adopting IGCC at the proposed facilities.

Many of the other claims in both cases involve whether DAQ followed adequate procedures to apply sufficiently stringent emissions limits in the permits to protect human health and air quality. Discovery on these claims will focus on the depositions of the DAQ personnel during the fact discovery stage. Discovery regarding the effects of the permits on Class I areas will likely require third-party document discovery from federal agencies, as well as depositions of personnel from the National Parks Service and EPA. Discovery related to the Prevention of Significant Deterioration Review will require discovery on the facts of prior changes to IPSC Units 1 and 2, which go to the issue of cumulative visibility and increments analysis.

Once fact discovery, including deposition of fact witnesses, is complete, the experts for IPSC and the Sierra Club will prepare their reports, and be deposed by the opposing parties. The Utah Rules of Civil Procedure provide for 240 days of fact discovery as a default, and 90 days more for expert discovery, a total of 330 days. Sierra Club's proposed schedule provides for DAQ's production of its administrative record on January 31, 2007, for discovery to start up in earnest in April 2007, following the Board's decisions on pre-discovery dispositive motions, and to close (for the IPSC appeal) on October 31, 2007 – a total of only approximately 180 days counting from the Board's expected decision on dispositive motions at the end of April 2008. Sierra Club believes that this amount of time required for discovery in the IPSC case alone is reasonable, and that if the Unit 3 and SPC appeals are consolidated, at least an additional 120 days for fact and expert discovery will be needed before either of the appeals can go to the formal hearing on the merits.

Sequential or Concurrent Review and Intervention

Sierra Club's proposed schedule would allow parties with limited resources – particularly Sierra Club and DAQ – to focus on discovery and briefing of the issues in a

structured manner. PacifiCorp, which has previously moved for intervention in both appeals, has represented that it is not interested in intervening in Unit 3 appeal, but still wishes to intervene in SPC appeal. SPC is interested in intervening in the Unit appeal, and vice-versa, to avoid an unfavorable precedent.[26] Sierra Club, and presumably respondent DAQ, are interested in conserving their limited resources to avoid being unfairly overwhelmed with discovery and motions simultaneously by multiple parties in multiple proceedings

To accommodate the interests of all parties, and streamline the process and facilitate the Board's review of the issues in the two appeals, Sierra Club proposes a schedule of sequential review of the two appeals. In other word, the schedule allows the Board and parties to deal with the Unit 3 appeal first, preserving SPC's rights and interests by allowing SPC's intervention in the Unit 3 matter on issues of law that have potential precedential value in the subsequent SPC appeal. Once the Board has rendered its decision on the Unit 3 appeal, discovery and the decision process in the SPC appeal would proceed at an accelerated pace. This sequential would allow SPC to protect itself from an adverse precedent by participating in the Unit 3 case, and would avoid the necessity of deciding on PacifiCorp's intervention in the SPC proceeding until the Unit 3 appeal is concluded

If the two appeals are consolidated, the Sierra Club respectfully requests that the Board consider its proposed schedule to be amended such that fact discovery closes on December 31, 2007, and expert discovery on March 31, 2008. These deadlines correspond to the 240 days and 90 days allowed under the Utah Rules (counting from the Board's decision in April 2007 on pre-discovery dispositive motions). Such a timeframe is absolutely necessary to allow Sierra Club to conduct discovery and brief motions in two concurrent appeals – the Unit 3 and SPC appeals – involving highly technical issues and 30 separate claims.

Timing and Length of Motions and Briefs

DAQ has not yet produced any information or the administrative record regarding that change. Until the administrative record is produced, it is fundamentally unfair, and a violation of due process, to allow the Applicants to begin filing motions on its defenses, forcing the Sierra Club to spend limited resources, when the Sierra Club is not able to begin preparing its motions because the administrative record is not yet available. Production of an indexed, organized, and bates-stamped administrative record, and the provision of copies or sufficient time and an opportunity to review the record to all parties must be the prerequisite for the beginning of any period for filing motions and conducting formal discovery. Sierra Club's proposed schedule includes a date, 10 days after the production of the administrative record, on which parties may begin to submit motions for the Board's consideration.

[26] This might not be sufficient ground for successful intervention

The Board's rules provide that briefs on motions be limited 15 pages, filed 12 days before the hearing, with an opposition to follow 10 days after the motion is filed. The Board may alter these limits and schedules.[27] To reduce the burden on the Board and parties with limited resources, Sierra Club proposes that the parties should be limited to one motion at each proposed motion stage (pre-discovery dispositive motions and post-discovery dispositive motions). Parties may raise as many claims within that one motion, and page limit should be increased to 30 pages, the normal time to file set at 30 days before the Board motion hearing, with oppositions 20 days after the motion is filed.

The rules provide that the pre-hearing briefing is limited to 20 pages.[28] Because of the complex issues involved in these cases, Sierra Club proposes that the Board expand that page limit to 40 double-spaced pages, not including attachments, exhibits, and the proposed order.

Sierra Club anticipates that its proposed schedule will lead to a shorter hearing in which the Board would have available to it, in advance, briefing and exhibits describing the factual basis of the parties' claims and defenses. Because of opportunities for full discovery and thorough submissions in advance of the hearing, the Sierra Club anticipates that post-hearing briefing will not be required before the Board renders its decision.[29]

Conclusion

Several factors combine in the present case to argue strongly for Sierra Club's proposed schedule. The provisions of the Utah APA and the Utah Rules of Civil Procedure provide for a default of 240 days of fact discovery, followed by 90 days of expert discovery. That these timeframes are appropriate is underscored by the importance the Utah Supreme Court has already attached to the proceeding, as well as by that court's rulings on the due process rights afforded to participants – regulated industry **or** citizens – participating in administrative adjudications. In addition, these are cases that involve significant factual issues and discovery from a variety of parties, including federal agencies, experts, and DAQ staff. It is also likely that parties will file motions seeking early disposition of some of the claims.

At the same time, it is difficult to square a compressed schedule for discovery and briefing with the requirements of a fair process and a meaningful opportunity for Sierra Club to be heard. It certainly would not be fair, or consistent with due process, for industries to have up to 17 months from the beginning of proceedings until their hearings, but for a different and drastically shorter schedule to be imposed on petitioners seeking to vindicate the public interest. There is no justification in these cases for shortening the time needed to follow proper procedures, beyond the concession that the Sierra Club has

[27] Utah Admin. Code R307-103-7(8).
[28] Utah Admin. Code R307-103-5(6)(a).
[29] The Administrative Procedures Rules provide for post-hearing briefing at the Board's discretion. Utah Admin. Code R307-103-5(6)(b).

made to conducting fact and expert discovery in 180 days on the Unit 3 matter, or approximately 300 days if the two proceedings are consolidated, and allowing the parties the necessary time will not pose any additional burden on the Board. In fact, it will allow the parties to present a streamlined case to the Board, based on written submissions, shortening the time needed for the formal hearing on the merits and making it easier for the Board to make its ultimate findings of fact and conclusions of law.

Any argument that the schedule for discovery leading up to the formal hearing on the merits can be shortened because Sierra Club or any of the parties "have had two years" to develop their positions makes no sense at all. First, DAQ has not yet responded to the requests for agency action in either Unit 3 or SPC matters, and has not yet produced the administrative record for its original permit decision. Any preparation of claims would have been based entirely on guesswork, which cannot reasonably be expected of any party.

Second, during the time that the requests for agency action were "dead" while Sierra Club pursued its appeals, the Sierra Club could not take discovery – if it has submitted requests for documents to the applicants, they would have been ignored or deemed harassment – after all, the Sierra Club was precluded from bring its cases. Third, no client would authorize development and preparation of a case when that case has been thrown out by the adjudicator and the parties are proceeding with the appeal to determine whether the case will be reinstated. Fourth, IPSC has proposed, and DAQ approved, the modification of the permit to use a boiler system that DAQ originally rejected as "not appropriate for the project." No explanation for the agency's change of mind has been made publicly available, and claims challenging the DAQ decision to modify the Unit 3 permit did not become available until Sierra Club learned of the decision in November 2006.

Finally, any "delay" in the Board's consideration of the Sierra Club's claims may be laid at the feet of the Applicants, who chose to challenge Sierra Club's standing to bring its claims. As noted above, the proceedings in this case effectively began on December 12, 2006, when the Board again got jurisdiction. The Applicants chose a litigation strategy that led, after a long interval, to the Supreme Court's decision emphatically affirming Sierra Club's right to have its claims heard in a meaningful way. Because the Applicants were responsible for the long delay in the Board's opportunity to review the case, they are in no position to argue that "the long time since the permits were approved" justifies a radically shortened and dramatically unfair process that contradicts the Board's obligation under the Utah APA to "prescribe means of discovery **adequate** to permit the parties to obtain all relevant information necessary to support their claims or defenses" pursuant to the Utah Rules of Civil Procedure.[30]

For the reasons described above, the Sierra Club's proposed schedule is reasonable, consistent with the requirements of the Utah APA, Utah Rules of Civil Procedure, administrative board precedent, and the requirements of fundamental fairness

[30] Utah Code Ann. § 63-46b-7(1)

and due process. Sierra Club respectfully requests that the Board adopt its proposed schedule for the Unit 3 and SPC hearing appeals.

Dated this 22nd day of December 2006

___/s/_____
JORO WALKER
Attorney for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2006, I served a true and correct copy of the foregoing **Sierra Club's Proposed Schedules** and **Memorandum in Support of its Proposed Schedules** on the following by email. The parties have agreed that service by email is sufficient.

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